RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; LATINO JUSTICE PRLDEF; ASIAN AMERICANS ADVANCING JUSTICE – AAJC; ASIAN AMERICANS ADVANCING JUSTICE - ASIAN LAW CAUCUS; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan law organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in numerous precedent-setting litigation relating to minority political representation and voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating minority voting rights. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001);

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[1] Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission.

Bush v. Vera, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) ("LJP"), founded in New York City in 1972, is a non-profit, non-partisan legal defense fund whose continuing mission is to protect the greater pan-Latino diaspora in the full, fair, and free exercise of their constitutional and civil rights. LJP has worked to secure the voting rights and political participation of Latino voters since 1972, when it initiated a series of suits to create bilingual voting systems throughout the United States. LJP has been involved in state and federal litigation regarding Latino political representation and voting rights, including constitutional and legal challenges to discriminatory redistricting plans or those otherwise implicating voting rights. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Arcia v. Florida Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014); *Favors v. Cuomo* (*Favors I*),

881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974).

Asian Americans Advancing Justice - AAJC is a nonprofit, nonpartisan organization that seeks to promote a fair and equitable society for all by working for civil and human rights and empowering Asian American, Native Hawaiian, and Pacific Islander (AANHPI) communities. Advancing Justice - AAJC advances its mission through advocacy, public policy, public education, and litigation. Advancing Justice - AAJC has maintained a strong interest in the voting rights of AANHPIs and strives to protect AANHPI's access to the polls. Advancing Justice - AAJC was a key player in collaborating with other civil rights groups to reauthorize the Voting Rights Act in 2006, and, in past elections, has conducted poll monitoring and voter protection efforts across the country. Advancing Justice - AAJC has a long-standing history of serving the interests of immigrant and language minority communities, and is very concerned with issues of discrimination that might face them.

Asian Americans Advancing Justice - Asian Law Caucus, founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Americans. Advancing Justice - ALC strives to create informed and educated Asian American communities empowered to assert their rights and to participate actively in American society. As such, Advancing Justice - ALC has for several decades operated a voting rights program that ensures equal access to voter registration,

language assistance in voting for limited-English proficient voters, and fair redistricting that empowers Asian American communities. Based on this commitment to protecting the voting rights of marginalized communities, Advancing Justice - ALC has a strong interest in the outcome of this case.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of people who are lesbian, gay, bisexual, or transgender ("LGBT"), or living with HIV—many of whom are members of racial and ethnic minorities—through impact litigation, education, and public policy advocacy. Lambda Legal works to challenge the intersectional harms caused by invidious discrimination based on sexual orientation, gender identity, race, and ethnicity. It has participated in this Court and lower courts in numerous cases addressing First Amendment, Equal Protection, and other civil rights principles affecting LGBT individuals, members of additional minority groups, and voter participation. For example, Lambda Legal was party counsel in *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 135 S. Ct. 2594 (2015); and participated as amicus in *Evenwel*, 136 S. Ct. 1120; *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013); and *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016). In addition, through such initiatives as Proyecto Igualdad, engaged in outreach in Latino communities, and its Fair Courts Project, seeking to increase diversity and eliminate bias in the courts, Lambda Legal works to ensure full civic participation by LGBT, racial, and ethnic minorities.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

Amici have a significant interest in ensuring the full, proper, and continued enforcement of the United States Constitution and the federal, state, and local statutes guaranteeing full and equal political participation, including the Voting Rights Act of 1965.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit recognized nearly 30 years ago, "elected officials engaged in the single-minded pursuit of incumbency can run roughshod

over the rights of protected minorities." *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). The same is true with respect to the pursuit of partisan advantage. Both Democratic and Republican legislatures have used the power of the state to enact extreme partisan gerrymanders, retaining or enhancing their own grip on power and subordinating voters who support an opposing party. Many of these gerrymanders were constructed at least in part at the expense of minority voting rights.

Although there are sizable minority communities in parts of Wisconsin, the instant case does not appear to rest on the manipulation of minority voters. In other instances, however, the pursuit of extreme partisan gerrymanders, particularly in those parts of our country where race and party are deeply intertwined, may well impact minority representation and political participation. For these reasons, any decision on the merits in this case may have wide-reaching implications for minority voters. *Amici* write in the hope that we may assist this Court in considering the ramifications of the doctrine and practice of partisan gerrymandering on minority voters beyond the instant case. In particular, *amici* explain how a properly structured partisan gerrymandering claim that requires a showing of intent to subordinate voters because of their party affiliation assists in establishing an administrable standard that guards against invidious partisanship in the redistricting process without undermining critical protections for minority voters.

When this Court as a whole last meaningfully considered the doctrine of partisan gerrymandering, all nine Justices recognized that "an *excessive* injection of politics" in the redistricting process is incompatible with the Constitution. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality) (emphasis in original); *id.* at 312, 316-17 (Kennedy, J., concurring in the judgment); *id.* at 318, 326 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., and Ginsburg, J., dissenting); *id.* at 355, 360 (Breyer, J., dissenting). No consensus emerged, however, with respect to identifying when the role of politics in redistricting becomes excessive.

As Respondents make clear, such standards can be formulated and can be fully compatible with federal law protecting minority representation and political participation. To the extent that the Court is inclined to set a justiciable standard for adjudicating claims of partisan gerrymandering, it should ensure that such claims succeed only when plaintiffs prove invidious discrimination distinct from legitimate political choices. In this case, the three-judge court found that the political party temporarily controlling state government intended to lock in its own power over the jurisdiction as a whole, not through the persuasive force of its policies, but by manipulating district lines to entrench the power of certain voters and subordinate others based on their partisan political affiliation. *See* J.S. App. 117a n.170. Recognizing that such extreme conduct entails impermissible invidious discrimination is consistent with the Court's prior jurisprudence, and calls for the deployment of familiar evidentiary tools.

Recognizing the constitutional invalidity of the invidious discrimination demonstrated in this case—subordination of voters within a jurisdiction as a whole because of their party affiliation—does not jeopardize the interests of minority voters. Indeed, because "political gerrymandering tends to strengthen the grip of incumbents at the expense of emerging minority communities," *Garza*, 918 F.2d at 779 (Kozinski, J., concurring and dissenting in part), a cause of action addressing egregious partisan gerrymandering may in some cases protect minority voters from improper manipulation by elected officials, including where existing causes of action afford no other remedy in practice. In certain contexts, a properly structured partisan gerrymandering claim could lessen the need for courts to undergo the difficulty of disentangling race and party, which this Court and others have recognized can be impermissible proxies for one another.

Finally, a viable cause of action addressing egregious partisan gerrymandering may assist the courts. Our own efforts, in litigation and beyond, show that causes of action in which race and racial discrimination remain a central doctrinal concern are essential in addressing some of the deepest and most pernicious forms of discrimination. But we have also observed that actors whose primary concerns are partisan will occasionally attempt to misuse race-based voting claims for their own ends, twisting facts or law in the process. A properly structured cause of action for partisan gerrymandering can help courts better channel claims down the appropriate litigation paths,

avoiding unwelcome doctrinal distortion and providing full redress for invidious discrimination of all forms.

ARGUMENT

A. A Cause of Action for Partisan Gerrymandering Is Justiciable and Requires Proof of Invidious Discrimination Against Voters Based on Their Political Party Affiliation

This Court has previously determined claims of unconstitutional partisan gerrymandering to be justiciable. *See, e.g., League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 414 (2006); *Davis v. Bandemer*, 478 U.S. 109, 125 (1986).

Among the questions presented in this case, however, are issues concerning the particular standard or standards for adjudicating claims of partisan gerrymandering under the Fourteenth Amendment. The three-judge court correctly determined that invidious intent was an essential element of such a standard, and found facts supporting proof of invidious intent. J.S. App. 109a-145a. Indeed, the court focused on a particularly extreme invidious intent: the "intent to make the political system systematically unresponsive to a particular segment of the voters based on their political preference," J.S. App. 117a n.170—that is, the intent to entrench one party and subordinate voters of another, statewide. A justiciable standard for claims that partisan gerrymandering violates the Fourteenth Amendment, whatever its other

elements, ought to require proof of invidious intent to subordinate voters because of their partisan affiliation. And this Court need not determine the outer bounds of such a requirement to recognize that an intent to stack the deck against voters jurisdiction-wide because of their party, an intent demonstrated in this case to the satisfaction of the three-judge court, is constitutionally invidious.

Requiring proof of this sort of invidious intent is consistent with this Court's doctrine. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court found no constitutional concern with a plan intended to allocate political power to parties in accordance with each party's voting strength. But the Court also noted that an otherwise acceptable redistricting plan would be vulnerable under the Fourteenth Amendment if it is invidiously discriminatory: intended to "minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 751 (internal quotation marks and citations omitted).

The Constitution also prohibits the invidious intent to harm on the basis of partisan affiliation in other contexts. A public employer may demote an employee for many reasons that do not offend the Constitution. But just last Term, this Court clarified that the First Amendment, as incorporated against state and local employers by the Fourteenth Amendment, normally prevents a public employer from demoting an employee out of a desire to punish the employee's support for a political candidate. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417-18 (2016). That is, "the government's reason for

demoting [the employee] is what counts here." *Id.* at 1418. *See also Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (three-judge court) ("Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation—a discernable and manageable standard.").

A gerrymandering cause of action that requires proof of invidious intent to subordinate voters because of their partisan affiliation does not risk undue interference with the legitimate political process. As this Court has recognized, redistricting is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality); *see also Gaffney*, 412 U.S. at 752-73. But this does not mean that redistricting is, or need be, root-and-branch an attempt to subordinate voters on the basis of their political affiliation. Legislatures frequently make choices that are inherently political—for example, how much revenue to allocate to different government programs, or what should be eligible for tax deductions. These are charged political questions, but they do not involve a conscious effort to subordinate voters because they are Republicans or Democrats. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV., at *23-24 (forthcoming 2017), https://ssrn.com/abstract=3011062.

Beyond the requirements of federal and state law, including those that protect minority voters from discrimination, there are many political and practical choices in the drawing of any redistricting map. In most states, these include choices about whether to follow certain county, city, or precinct lines but not others, or certain roads, rivers, or rail lines but not others; about the degree to which lines should follow geometric patterns or patterns of residential development; about allowing certain activists or communities to congregate within one district or to span district lines; and about the degree to which a district should have a distinct character or span multiple competing interests, and which of those interests should dominate. They include choices—even self-regarding choices—about whether to protect incumbents, at least in the sense of consistently protecting the relationship of incumbents to their constituents by maintaining the cores of prior districts, rather than selectively protecting incumbents from their constituents by siphoning off opposing partisans. *See LULAC*, 548 U.S. at 440-41; *White v. Weiser*, 412 U.S. 783, 791 (1973). They include choices about whether to resolve each of these decisions in the same way throughout a jurisdiction, or whether to resolve them differently, with different priorities, in different portions of the jurisdiction. All of these are properly political and practical choices. Prohibiting state action with the invidious intent to subordinate on the basis of partisan affiliation leaves each of these legitimate political choices intact. *See* Levitt, *supra*, at *30-34.

A state actor's invidious intent to subordinate voters on the basis of their partisan affiliation is also distinct from the natural desire of legislators chosen in partisan elections to seek legitimate partisan advantage. The normal means by which a legislator gains partisan advantage is through action that increases the legislator's appeal to voters with partisan policy preferences. Such conduct is quite distinct from state action designed to lock in a legislator's electoral success not by appealing to voters, but by targeting opponents through changes in the electoral landscape itself.

Both state and federal courts have been able to identify cognizable invidious intent, distinct from the standard rough-and-tumble of other political choices. In *Cox v. Larios*, a three-judge court determined that population disparities that would not otherwise have raised prima facie constitutional concern were constitutionally invalid because they were driven by invidious partisan intent. 300 F. Supp. 2d 1320, 1329-30, 1334 (N.D. Ga. 2004) (three-judge court). This Court summarily affirmed that decision. 542 U.S. 947 (2004). Similarly, the Fourth Circuit recently invalidated a county redistricting plan that would otherwise have passed muster, based on proof of the invidious partisan intent driving the districts' population deviations. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 345-46, 351 (4th Cir. 2016); *see also City of Greensboro v. Guilford Cnty. Bd. of Elections*, __ F. Supp. 3d __, 2017 WL 1229736, at *1, *3, *6 (M.D.N.C. Apr. 3, 2017); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1050 (S.D. Ill. 2001). Florida state courts have also examined redistricting plans

for invidious partisan intent under their state constitution. *See* Fla. Const. art. III, § 16(c); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 598, 617-19, 641-45, 648-51, 654, 659-62, 669-73, 676-78, 679-80 (Fla. 2012); *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So.3d 872, 881-82, 887-91 (Fla. 2012); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 378-86, 391-93, 402-13 (Fla. 2015); *League of Women Voters of Florida v. Detzner*, 179 So.3d 258, 271-74, 279-80, 284 (Fla. 2015). And, of course, the three-judge court in the instant case was able to distinguish invidious partisan intent from the many other legitimate political and practical choices involved in drawing the Wisconsin state legislative map. J.S. App. 109a-145a.

In other cases, the evidence has not supported allegations of invidious partisan intent in the redistricting process. For instance, just last Term, this Court affirmed the rejection of a claim premised on invidious partisanship in the redistricting process, based not on the impossibility of making such a determination, but on the insufficiency of proof offered by the plaintiffs. *Harris v. Ariz. Ind. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016).

All of these courts used familiar tools to test for invidious partisan intent in the redistricting process, seeking "an understanding of official objective emerg[ing] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). Following this Court's direction for assessing official

purpose in a variety of contexts, each tribunal conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev'p Corp.*, 429 U.S. 252, 266 (1977). Particularly when a redistricting plan proved to be a significant outlier, its partisan impact occasionally provided "an important starting point," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (quoting *Arlington Heights*, 429 U.S. at 266), for such an analysis. However, recognizing that legitimate redistricting factors will inevitably yield a partisan impact, no court relied on an assessment of impact alone. Instead, these courts further examined the redistricting context, including but not limited to: statements by mapmakers themselves, the conduct of the legislative session, the progression of draft maps up to the final product, and the map's fit with traditional redistricting principles. *See* J.S. App. 123a-145a; *Raleigh Wake Citizens Ass'n*, 827 F.3d at 346; *City of Greensboro*, 2017 WL at *7-8; *League of Women Voters of Florida*, 172 So.3d at 380-86, 390-91; *Hulme*, 188 F. Supp. 2d at 1050-51. Moreover, these courts also considered whether this evidence of invidious intent was effectively rebutted by evidence revealing that the district boundaries were actually driven not by invidious partisan intent but by legitimate legislative motives. *Id.* In the instant case, the three-judge court undertook this latter assessment as part of the inquiry into the Wisconsin map's "justification." J.S. App. 203a-211a.

This inquiry into invidious partisan intent is not facile. Plaintiffs must prove that state action was taken "at least in part 'because of,' not merely 'in

spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. Courts do not lightly make such determinations. Here, the court found that plaintiffs proved not merely that the legislature had partisan information or was aware of a partisan impact, but that it drew the map specifically "because of" its ability to entrench one party in power and subordinate voters affiliated with an opposing party, statewide. J.S. App. 117a; *see also Feeney*, 442 U.S. at 279.

In other words, the court, properly, did not allow plaintiffs to merely assume that the legislature operated with invidious intent. The standard is a demanding one, and necessarily means that a doctrinal requirement to prove invidious partisan intent will inevitably leave some invidious partisanship unaddressed. *Cf. McCreary County*, 545 U.S. at 863 (recognizing that some legitimate intent cases may founder on the absence of proof). That litigation reality, however, does not detract from the value of the ability to confront and correct invidious discrimination that can be proven. *Cf. Batson v. Kentucky*, 476 U.S. 79, 102, 105-08 (1986) (Marshall, J., concurring) (endorsing doctrine to confront racially discriminatory peremptory challenges, while acknowledging that illegitimate peremptory challenges beyond the doctrine's reach are inevitable).

Even though a doctrinal requirement to prove invidious partisan intent leaves some invidious partisanship unaddressed, the requirement is necessary to a manageable constitutional claim. *See, e.g., Bandemer*, 478 U.S. at 127. Virtually every

change to a district line will have some impact, substantial or trivial, on the electoral fortunes of candidates within the district. *Gaffney*, 412 U.S. at 753 ("It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area."). Depending on local political demography, actions consistent with traditional redistricting principles or required by existing law will likely have partisan consequences. Courts cannot police these consequences based on their impact alone without subjugating otherwise legitimate choices to a standard difficult to locate in the Constitution. And whatever the other elements of a manageable partisan gerrymandering claim, a requirement to show invidious partisan intent will preserve constitutional flexibility for state and local redistricting bodies to pursue these other legitimate principles independent of their political impact.

Consistent with this premise, no party in the instant case has requested, the three-judge court did not propose, and this Court should not adopt, any single quantitative metric as irrebuttable proof of an unconstitutional partisan gerrymander. Various quantitative measures have been offered to this Court, in this case and others, to assist the Court in assessing gerrymandering. *See* Appellees' Br. *passim*; *see generally* Bernard Grofman & Ronald Keith Gaddie Amici Br. 12-18, 26-31; Eric McGhee Amicus Br. *passim*; Heather Gerken *et al.* Amicus Br. 13-25. This brief takes no position on the comparative merits or limitations of any particular quantitative measure: to the extent any are useful, they are most useful as diagnostic tools of qualitative

constitutional irregularity. Modest "scores" using any of these measures may flag plans produced by legislatures heeding only traditional redistricting principles without improper motivation, and therefore constitutionally unremarkable. Extreme "scores," on any of several of these quantitative measures, may indicate partisan results sufficiently anomalous to constitute, *inter alia*, circumstantial evidence of invidious partisan intent. But as the three-judge court in this case emphasized, a jurisdiction should always have the opportunity to demonstrate that even an extreme quantitative score was actually caused by legislative focus on constitutionally legitimate factors, including traditional redistricting principles.[2] *See, e.g.*, J.S. App. 203a-218a.

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[2] As this Court recently emphasized in a different redistricting context, this inquiry into legislative intent turns on "the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *cf. McCreary County*, 545 U.S. at 864 (refusing to credit a hypothetically permissible purpose that is merely a sham); J.S. App. 120a-122a (refusing to insulate an invidious partisan gerrymander just because the outcome also happens to be consistent with the hypothetical application of traditional redistricting principles).

Bethune-Hill concerned a claim based on the impermissible use of race in redistricting, following *Shaw v. Reno*, 509 U.S. 630 (1993). While *Shaw* claims are "analytically distinct" from claims premised on racially discriminatory intent, *LULAC*, 548 U.S. at 513-14 (Scalia, J., concurring in the

B. A Properly Structured Claim for Partisan Gerrymandering Is Consistent with the Voting Rights Act

A properly structured partisan gerrymandering claim—one that requires proof of invidious intent to subordinate voters because of their partisan affiliation—is entirely consistent with the Voting Rights Act of 1965 ("VRA"). Of course, compliance with the VRA does not insulate an unconstitutional partisan gerrymander from judicial scrutiny. Legislatures might produce maps that comply with the VRA along the way to implementing an unlawful plan premised on invidious partisan intent, just as legislatures might produce plans that are fair along partisan lines even as they violate the VRA (or Fourteenth and Fifteenth Amendments) by discriminating based on race. Neither is lawful. But compliance with the VRA and the absence of invidious partisan intent are not in any way inherently in conflict.

Section 2 of the VRA, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting

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judgment in part and dissenting in part), the legislature's actual motivation is even more pivotal in a discrimination case. Whether that discrimination involves impermissible racial discrimination or the invidious intent to subordinate voters based on partisan affiliation, jurisdictions should not be permitted to whitewash actual manifestations of discrimination with hypothetical interests invented for litigation purposes.

qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* § 10301(a).

In 1982, Congress amended Section 2 to make clear that a statutory violation can be established by showing discriminatory intent, a discriminatory result, or both. *See Thornburg v. Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); *see also* 52 U.S.C. § 10301(a)-(b); S. Rep. No. 417, 97th Cong., 2d Sess. (1982). In the redistricting context, a jurisdiction may comply with the prohibition on discriminatory intent by drawing district lines without the intent to harm voters based on their race or ethnicity. It is obvious that a jurisdiction can satisfy this standard without drawing lines intended to subordinate voters on the basis of their partisan political affiliation.

Similarly, a jurisdiction may comply with the prohibition on discriminatory results without setting out to subordinate voters on the basis of their political affiliation. Based on local demographic, historical, and political contexts, jurisdictions may have an obligation under Section 2 to draw districts preserving minority voters' equal "opportunity . . . to elect representatives of their choice." 52 U.S.C. § 10301(b). Where a compact and sizable minority community is politically cohesive, and where voting is sufficiently polarized that the surrounding electorate would otherwise usually prevent the minority community from electing a candidate of choice, jurisdictions have an obligation to ensure that districts, in the totality of circumstances, do not

create a discriminatory abridgement of electoral opportunity. *Gingles*, 478 U.S. at 44-45, 50-51.

Compliance with Section 2 of the VRA will thus often require attention to, *inter alia*, local political preferences. *Id.* at 45 (recognizing that "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process"); *id.* at 79 (noting that this determination "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms"); *see also Goosby v. Hempstead, N.Y.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997) (using a myriad of factors identified by a bipartisan Congress, "district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used").

The VRA does not, however, require districts drawn generically with the intent to aid or harm Democrats, Republicans, or members of any other political party. And a district that is drawn favoring Democrats or favoring Republicans but that does not provide a minority community the equitable "opportunity . . . to elect representatives of *their* choice," 52 U.S.C. § 10301(b), fails to satisfy the jurisdiction's VRA obligations. *See, e.g.*, *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("[T]he Act's guarantee of equal opportunity is not met when, in the words of Judge Richard Arnold, '[c]andidates favored by blacks can win, but only if the candidates are white.'") (quoting *Smith v.*

Clinton, 687 F.Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court)).

This means that while the VRA requires attention to local political preferences, it does not require districts drawn for voters because of their partisan affiliation. *A fortiori*, it in no way requires an invidious intent to harm voters based on their partisan affiliation, much less an intent to subordinate across the jurisdiction as a whole. Indeed, many courts, including this Court, have required jurisdictions to comply with their obligations under the VRA, without ever intimating that doing so would require invidious partisan intent. And just last Term, in a case involving population disparities, this Court unanimously affirmed the rejection of a claim of invidious partisan intent when the facts instead supported the conclusion that the disparities were driven by good-faith efforts to comply with the VRA. *Harris*, 136 S. Ct. at 1309-10. That is, this Court recognized that legitimate VRA compliance did not—and does not—produce invidious partisanship.

With invidious partisan intent an essential element of a manageable partisan gerrymandering claim, there is no tension between such a claim and the VRA. Arguments to the contrary ignore the role of invidious intent in a properly structured partisan gerrymandering claim. The National Republican Congressional Committee ("NRCC"), for example, argues as *amicus* that the "efficiency gap" quantitative measure creates a potential conflict between a partisan gerrymandering claim and Section 2 of the VRA. Nat'l Republican Cong. Comm.

Amicus Br. 39-41. The NRCC posits that measures like the efficiency gap would not distinguish between districts drawn for VRA purposes and those drawn as part of a partisan gerrymander, and would "falsely label[ ] Voting Rights Act remedial plans as political gerrymanders. *Id.* at 40. Historical practice suggests that the NRCC's hypothetical concerns are unwarranted. *See generally* Michael Li & Laura Royden, Minority Representation: No Conflict with Fair Maps, https://www.brennancenter.org/analysis/minority-representation-fair-maps (revealing that most states with majority-minority districts have exhibited little durable partisan bias).

But more important, if invidious intent is an essential element of a partisan gerrymandering claim, this argument is essentially irrelevant. Any individual quantitative measure, including but not limited to the efficiency gap, will likely reflect the partisan impact not only of VRA compliance, but also other legitimate redistricting factors that a jurisdiction may pursue. But no party has advocated for, and this Court should not adopt, any individual quantitative measure as the exclusive determinant of a partisan gerrymandering claim. Even if an extreme efficiency gap—or an extreme value of any other measure—provides circumstantial evidence of a particular plan's invidious intent, a jurisdiction must have the opportunity to rebut that evidence with evidence that legitimate factors instead drove the redistricting lines. *See supra* at 12. (In the instant case, this evidence was assessed as part of the inquiry into the Wisconsin map's "justification." J.S. App. 203a-211a.) If a jurisdiction's legitimate attempt to comply with the VRA somehow yielded

districts establishing a high partisan "score," the fact that the score was merely the product of VRA compliance would show there was no invidious intent. And absent proof that invidious partisan intent actually motivated the districts in question, a claim must collapse. Any incidental political impact of VRA compliance in a particular plan is not threatened by a partisan gerrymandering claim with invidious intent at its core because legitimate VRA compliance does not produce an invidious intent.

Beyond the VRA, other legitimate redistricting considerations, including traditional redistricting principles, may similarly further the concerns of minority voters without running afoul of a properly structured partisan gerrymandering claim. For example, in some circumstances, the political interests of minority voters may be served by efforts to keep the community intact within a district, even where there is no federal mandate to do so. Keeping that community intact raises no inference that a legislature intends to subordinate voters based on their partisan affiliation.

Similarly, in some circumstances, the political interests of minority voters may be served by preserving the core of an existing district, and hence the relationship of a population with a longstanding incumbent. Doing so raises no inference that a legislature intends to subordinate voters based on their partisan affiliation. A robust requirement of invidious intent ensures that legitimate compliance with traditional redistricting principles, including those that advance the interests of minority voters, is

not inadvertently conflated with illegitimate partisanship.

C. A Properly Structured Claim for Partisan Gerrymandering Would Help Protect Against the Manipulation of Minority Voters

History shows that *both* major political parties—Democratic and Republican—have drawn electoral districts in pursuit of their partisan interests in ways that have harmed minority voters. Particularly where existing causes of action afford no remedy for such manipulation, a justiciable cause of action for partisan gerrymandering can help protect minority voters.

Following the 1970 Census, Texas Democrats drew multimember districts in Dallas and Bexar counties that were "unconstitutional in that they dilute the votes of racial minorities." *Graves v. Barnes*, 343 F. Supp. 704, 708-709, 724-34 (W.D. Tex. 1972) (three-judge court). A three-judge district court did not reach the partisan gerrymandering claim brought by Republican voters and officials because the claim of racial vote dilution delivered the requested relief. *Id.* at 735. This Court unanimously affirmed that finding of unconstitutional vote dilution. *White v. Regester*, 412 U.S. 755, 765-70 (1973).

Similarly, in Mississippi, following the 1980 Census, Black voters challenged the state's congressional redistricting plan, drawn by Democrats, which "divided the concentration of black

majority counties located in the northwest or 'Delta' portion of the state among three districts." *Jordan v. Winter*, 604 F. Supp. 807, 809 (N.D. Miss. 1984) (three-judge court), *aff'd sub nom., Miss. Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). The districts were drawn to protect three incumbent Democrats from Republican challengers (and thus maintain the Democrats' control of the state's congressional delegation), and Republican officials in Mississippi "lobb[ied] the Justice Department on behalf of Mississippi black[voters] and Republicans to reject the legislature's redistricting plan." Art Harris, *Blacks, Unlikely Allies Battle Miss. Redistricting*, Wash. Post, June 1, 1982. The Department of Justice interposed an objection under Section 5 of the VRA, and a three-judge district court then held that a subsequent iteration of the redistricting plan continued to discriminate against Black voters in violation of Section 2 of the VRA. *Jordan*, 604 F. Supp. at 809, 813-15.

As noted above, the Democratic Party is not alone in pursuing redistricting plans that seek partisan advantage at the expense of minority voters. In 2003, after Texas Republicans "gained control" of "both houses of the [state] legislature," they drew a new congressional redistricting plan with "the dual goal of increasing Republican seats in general and protecting [Republican Henry] Bonilla's incumbency." *LULAC*, 548 U.S. at 423-24. In doing so, however, the legislature diluted Latino voting strength in Congressional District 23, in violation of Section 2 of the VRA. *Id.* at 438-42. As this Court observed, "[t]he State chose to break apart a Latino opportunity district to protect the incumbent

congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district." *Id.* at 441. "This b[ore] the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440. In 2011, the Republican legislature again redrew the lines, including District 23. "As it did in 2003, the Legislature [ ] reconfigured the district to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district." *Perez v. Abbott*, __ F. Supp. 3d __, 2017 WL 1787454, at *10 (W.D. Tex. May 2, 2017) (three-judge court). Indeed, a three-judge court described the map as a whole as follows:

> It is undisputed that Defendants engaged in extreme partisan gerrymandering in drawing the map, ignoring many if not most traditional redistricting principles in their attempt to protect Republican incumbents, unseat [a Democratic incumbent], gain additional Republican seats, and otherwise gain partisan advantage. Defendants do not really dispute the fact that minority populations are divided or "cracked" in the plan . . . .

Id. at *56. Ultimately, the court found that the state's treatment of minority voters amounted to multiple violations of Section 2 of the VRA and the Constitution. *Id.* at *27, *50, *69.

Thus, both major political parties have drawn—and are capable of drawing—district lines to entrench themselves and subordinate the opposition

in ways that harm minority voters. As the foregoing examples indicate, the racial harms produced by some extreme partisan gerrymanders can sometimes be remedied under existing law in accordance with the VRA and the Fourteenth and Fifteenth Amendments. Notably, in another case arising out of Wisconsin, a three-judge district court found that the redistricting plan that is at issue in this case violated Section 2 of the VRA by diluting Latino voting strength. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 859 (E.D. Wis. 2012) (finding that "plaintiffs are entitled to relief on their Section 2 claim concerning New Assembly Districts 8 and 9, because Act 43 fails to create a majority-minority district for Milwaukee's Latino community").

However, extreme partisan gerrymanders may also injure minority voters in ways that do not produce cognizable or provable race-based harm; without a viable cause of action addressing partisan gerrymandering, these minority voters (like all voters) may have no practical means to remedy the invidious partisan action. That is, race-based causes of action do not safeguard minority voters from all partisan harm; in some circumstances, minority voters suffer from extreme partisan gerrymandering just as other voters do.

For instance, to prevail on a Section 2 vote dilution claim, "a party . . . must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality opinion) (describing the first

precondition for a claim under Section 2 of the VRA as set forth in *Gingles*, 478 U.S. at 50). As a result, in the absence of sufficient evidence of racially discriminatory intent, smaller or less compact populations of minority voters cannot rely upon Section 2 of the VRA to challenge a state or local jurisdiction's redistricting decisions, including decisions to eliminate crossover districts—districts in which minority voters "make up less than a majority of the voting-age population," but are "large enough to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *See id.* at 13, 19-20, 24.[3] Even without a right protected by Section 2 of the VRA, these minority voters might find themselves among those injured by an invidious partisan scheme. *See, e.g.*, *Perez*, 2017 WL 1787454, at *71-75.

A Section 2 vote-dilution claim also requires a showing of racially polarized voting. *See Gingles*, 478 U.S. at 50-51 (describing the second and third preconditions for such a claim). Yet, in some circumstances, minority voters may face challenges

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[3] Absent racially discriminatory intent, Section 2 is not available to challenge such a district; however, once liability has been established (*i.e.*, plaintiffs show *inter alia* that a majority-minority district can be drawn), crossover districts can be an appropriate means for states and local jurisdictions to comply with the VRA and remedy minority vote dilution. *Id.* at 23 (noting that "§ 2 allows States to choose their own method of complying with the Voting Rights Act, and . . . that may include drawing crossover districts").

obtaining the data necessary to satisfy this requirement. *See, e.g.*, Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. Irvine L. Rev. 359, 382-97 (2013) (noting that "the number of cases of Asian American candidates running for political office (in majority white districts) is probably too small to make an accurate judgment of either white support or opposition" and highlighting other data and statistical challenges for Asian American communities to meet "all three *Gingles* prongs"); Glenn Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 Fordham Urb. L.J. 739, 764 (2001) (noting that "[t]he dearth of data on Asian American voting patterns, . . . compounded by less than perfect census data, has made it difficult to determine definitively whether Asian Americans" meet the second and third *Gingles* preconditions). In either of the above scenarios, a properly structured claim for excessive partisan gerrymandering might provide much-needed relief to all voters injured because of their party affiliation (including minority voters beyond the reach of a Section 2 vote dilution claim).

In addition, minority voters may be injured by legislatures allegedly acting with impermissible racial intent; the defense often asserted in such cases is that the legislature was motivated more by partisanship than by race. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 567, 586 (N.D. Ill. 2011) (three-judge court); *Cooper v. Harris*, 137 S. Ct. 1455, 1473, 1476 (2017). Where the evidence establishes that voters have been targeted based on their race or ethnicity,

as a proxy for party, such a defense has no purchase. Courts have repeatedly affirmed that the unjustified targeting of minority voters for injury is unlawful, whether they are targeted based on animus or as the means to achieve ultimate partisan ends. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 241 n.30 (5th Cir. 2016) (en banc) (Haynes, J.) (noting that "[i]ntentions to achieve partisan gain and to racially discriminate are not mutually exclusive" and that accordingly, "acting to preserve legislative power in a partisan manner can also be impermissibly discriminatory"), *cert. denied*, 137 S. Ct. 612 (2017); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (noting that "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"), *cert. denied*, 137 S. Ct. 1399 (2017); *Garza*, 918 F.2d at 778 & n. 1 (Kozinski, J., concurring and dissenting in part) (explaining that incumbents may pursue intentional racial discrimination for political gain without displaying racial animus); *One Wis. Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 924-25 (W.D. Wis. 2016) (holding that a voting measure in Wisconsin "was motivated in part by the intent to discriminate against voters on the basis of race" and that "suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve [a] political objective"), *appeal docketed*, No. 16-3091 (7th Cir. Aug. 3, 2016); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (finding, in the circumstances of that case, that "there is little point . . . in distinguishing discrimination based on an ultimate objective of keeping certain incumbent

whites in office from discrimination borne of pure racial animus"); *cf. Harris*, 137 S. Ct. at 1473 n.7 (noting, in the context of racial gerrymander claims, that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests").

However, as this Court and other federal courts have recognized, race and party are, in certain contexts, closely intertwined. *See, e.g.*, *Harris*, 137 S. Ct. at 1474 (noting evidence that in North Carolina, "racial identification is highly correlated with political affiliation" (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001))); *United States v. Charleston County, S.C.*, 365 F.3d 341, 352 (4th Cir. 2004) (Wilkinson, J.) (noting evidence that in South Carolina, party affiliation and race were "inextricably intertwined"); *Perez*, 2017 WL 1787454, at *56 (noting evidence that "race and political party affiliation are strongly correlated in Texas").[4] Particularly in those circumstances, defendants may attempt to shield themselves from claims of racial discrimination by claiming partisan intent—and where the evidence is insufficient to distinguish the two, an egregious gerrymander may inflict its damage without evidence sufficient to prove that

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[4] Of course, even where such correlation exists, it in no way renders race and party legally equivalent or fungible. As described above, targeting minority voters for injury has long been recognized as unlawful, period, whether as a proxy for party or not. And minority voters continue to face unlawful discrimination within closed party primaries, where opposition on the basis of party is not at issue.

voters were specifically targeted because of their race or ethnicity. *See, e.g.*, *Perez*, 2017 WL 1787454, at *75-78. In those circumstances, the recognition of a properly structured claim for partisan gerrymandering could not only lessen the need for courts to disentangle race and party, but also better ensure that the fundamental right to vote of all minority voters is fully protected. *See, e.g.*, Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 Ohio St. L.J. 867, 871, 904 (2016) (noting that "racial, partisan, and administrative motives have blurred" and that "if the Court decides to adjudicate partisan gerrymandering claims, it would obviate much of the quagmire . . . on how racial motivations may be disentangled from partisan ones").

D. A Properly Structured Claim for Partisan Gerrymandering Will Help Avoid Detrimental Spillover to Cases Brought Under Doctrines Involving Race

Cases involving claims of racial discrimination under the VRA and the Fourteenth and Fifteenth Amendments play an essential role in remedying the deepest and most pernicious forms of discrimination in voting. *See, e.g.*, *LULAC*, 548 U.S. at 438-42 (finding vote dilution in violation of Section 2 of the VRA with respect to Congressional District 23 in Texas); *Gingles*, 478 U.S. at 34, 80 (finding vote dilution in violation of Section 2 of the VRA with respect to state legislative districts in North Carolina); *Rodgers v. Lodge*, 458 U.S. 613 (1982) (finding vote dilution in violation of Fourteenth and Fifteenth Amendments with respect to county

commission in Georgia); *White*, 412 U.S. at 765-70 (finding vote dilution in violation of the Fourteenth Amendment with respect to state house districts in Texas); *cf. Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016) (three-judge court) (finding unconstitutional racial gerrymander with respect to state legislative districts in North Carolina), *aff'd*, 137 S. Ct. 2211 (2017).

No doubt they will continue to do so. As members of this Court have recognized, "racial discrimination and racially polarized voting are not ancient history," and "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, 556 U.S. at 25 (plurality opinion) (Kennedy, J.); *see also Shelby County*, 133 S. Ct. at 2619 ("[V]oting discrimination still exists; no one doubts that.").

However, in the absence of a legal standard for claims of partisan gerrymandering, partisan actors—both Democrats and Republicans—have also attempted to bring race-based claims to address their partisan concerns. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 630-31 (2002) ("One of the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the . . . category of race."); *see also, e.g., Ohio Democratic Party v. Husted*, 834 F.3d 620, 624-25 (6th Cir. 2016) (state and local Democratic Party organizations asserting race claims under the

Constitution and Section 2 of the VRA); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 581 (E.D. Va. 2016) (state Democratic Party asserting race claims under the Constitution and Section 2 of the VRA), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *Comm. for Fair & Balanced Map*, 835 F. Supp. 2d at 566-67 (Republican voters and officials asserting race claims under the Constitution and Section 2 of the VRA); *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993) (Democratic voters and officials asserting race claims under the Constitution and Section 2 of the VRA).

Litigation that stems from partisan concerns but is brought under race-based causes of action could exert pressure on courts to twist facts or doctrine (*i.e.*, to try to fit a square peg into a round hole) in ways that are potentially detrimental to the development of the law. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 569 (2004) (noting "the spillover effects" of litigation brought to "attack political gerrymanders" under "doctrinal rubrics, such as section 2 of the [VRA] or the *Shaw* cases," and suggesting that "the cost of repackaging essentially partisan claims of excessive partisanship under one of these labels is something that needs to be considered"). Injury based on race and injury based on partisan affiliation are of different moral and historical character, and should be neither confused nor conflated. Legal doctrines focused on addressing racial discrimination should remain dedicated to that goal, without being subverted to contend with litigation incentives more suitable for claims in which the principal alleged injury is partisan. The

recognition of a distinct litigation framework including a properly structured claim for partisan gerrymandering would allow such cases to be channeled toward the most appropriate doctrinal paths and to avoid any negative spillover effect.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court should be affirmed.

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Respectfully Submitted,

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